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In the Supreme Court of the United States

INTEL CORPORATION,

Petitioner,

v.

ADVANCED MICRO DEVICES, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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BRIEF OF *AMICUS CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES IN SUPPORT OF PETITIONERS

INTEREST OF THE *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States, the world's largest business federation, is a nonprofit corporation organized under the laws of the District of Columbia. The Chamber represents an underlying membership of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. The Chamber is well situated to address the merits of this case on behalf of companies collectively responsible for a substantial portion of total U.S. economic activity.

The Chamber is particularly concerned about the growing trend of private actors – including litigants, class-action counsel, and complainants before foreign administrative authorities – to engage in global forum shopping by attempting to export U.S. laws and procedures worldwide. More troubling is that these actors recently have been successful in making U.S. courts complicit in this process, despite foreign countries' protests. In one case in which this Court recently granted certiorari, foreign litigants and their counsel sued in U.S. courts, alleging antitrust

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[1] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the filing of this brief. The parties' letters of consent have been lodged with the Clerk of the Court. Pursuant to Rule 37.6 of the Rules of this Court, the Chamber states that no counsel for a party has written this brief in whole or in part and that no person or entity, other than the *amicus curiae*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

injuries sustained *outside* of U.S. commerce. *F. Hoffman-LaRoche, Ltd.* v. *Empagran S.A.*, No. 03-724, cert. granted Dec. 15, 2003. In *Empagran*, the D.C. Circuit held plaintiffs entitled to U.S. laws and procedures, regardless whether U.S. laws and procedures were different from, or even inimical to, those of the jurisdiction where any harm may have occurred. In this case, respondent has convinced the Ninth Circuit that it might be entitled to discovery of documents and testimony from petitioner, based on the existence of a mere preliminary investigation by the European Commission. Respondent claims such a statutory right whether or not (1) it is a litigant before a foreign tribunal; (2) there is any adjudicative proceeding before a foreign tribunal under way at all; and (3) the laws and procedures of the foreign jurisdiction allow the discovery respondent seeks.

The Chamber believes that the decision below impermissibly broadens the scope of discovery allowed to private parties seeking information from their business rivals under 28 U.S.C. § 1782. The unreasonably permissive rules applied below operate any time that the company from which discovery is sought is subject to the jurisdiction of any foreign sovereign's courts or regulatory bodies. Burdensome discovery requests are not unique to these broad interpretations of Section 1782, but the Ninth Circuit's decision magnifies the burden. Under that decision, parties can obtain discovery without themselves bearing any of the expenses of litigation and without being required to surmount even the low hurdles of Federal Rules of Civil Procedure 8 and 11. Important disincentives to harassing and unwarranted discovery requests are eliminated. If the Ninth Circuit's ruling stands, a business can obtain broad discovery by merely filing a complaint with a foreign enforcement agency.

The Ninth Circuit's ruling allows competitors to seek this discovery even if the relevant foreign nation does not allow it. That circumvention of foreign discovery rules can place companies like members of the Chamber, which have a presence in the United States, at a substantial disadvantage vis-à-vis their

foreign rivals. Rivals can inquire into competitively sensitive information, under the imprimatur of a U.S. District Court, even though the information is not needed by the foreign sovereign's court or administrative body.

The Ninth Circuit attributed to Congress an intent to impose substantial burdens on U.S. businesses conducting business in foreign countries. Members of the Chamber, many of which conduct business abroad and are therefore subject to the jurisdiction of foreign sovereigns' courts and administrative bodies, have a substantial interest in the restoration of appropriate limits on discovery under Section 1782.

STATEMENT

A. The Statutory Scheme

Section 1782 of Title 28 of the U.S. Code was enacted to permit district courts to assist litigants in foreign adversary proceedings to obtain discovery in the United States. Congress enacted the modern Section 1782 in 1948 and amended the section in significant part in 1964.[2] The 1964 amendments were part of a larger piece of legislation with the express purpose of "providing equitable and efficacious procedures for the benefit of tribunals and litigants involved in litigation with international aspects." S. REP. NO. 88-1580, 88th Cong., 2d Sess. (1964), reprinted in 1964 U.S.C.C.A.N. 3782, 3783. The goal of the changes was to "bring[] the United States to the forefront of nations adjusting their procedures to those of sister nations * * * [and] invite foreign countries similarly to adjust their procedures." *Ibid.*

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[2] Section 1782 actually is descended from a statute originally enacted in 1855. See *In re Letter Rogatory from the Justice Court*, 523 F.2d 562, 566-569 (6th Cir. 1975) (appendix detailing the history of judicial assistance statutes). The statute was enacted in 1948 at its current place in the U.S. Code. Act of June 25, 1948, ch. 646, 62 Stat. 949. In 1949, Congress amended Section 1782 in pertinent part to replace the phrase "civil action" with "judicial proceeding." Act of May 24, 1949, ch. 139, § 93, 63 Stat. 103.

This legislation was forwarded to Congress in 1963 by the Commission and Advisory Committee on International Rules of Judicial Procedure. With the proposed legislation, the Commission included a May 27, 1963, letter by President John F. Kennedy, expressing the administration's view that the proposed legislation "would be most desirable from the standpoint of the administration of international justice on behalf of private litigants." *Id.* at 3794. Walter Olney III, the Director of the Administrative Office of the U.S. Courts, wrote to the Chairman of the Senate Judiciary Committee in 1964, noting the approval of the Judicial Conference of the United States. Director Olney stated: "The procedures that would be presented by this legislation * * * would alleviate some of the many procedural problems private litigants now face in prosecuting litigation with international aspects." *Ibid.*

The scheme adopted in 1964 to assist private litigants included new statutory sections as well as amendments to pre-existing sections, all of which have the same express purpose of assisting with "litigation with international aspects." *Id.* at 3785. For example, Congress added 28 U.S.C. § 1696, which provides for service of process in the United States in "litigation with international aspects" (*id.* at 3784) pursuant to a letter rogatory or request "by a foreign or international tribunal," or "upon application of any interested person." 28 U.S.C. § 1696(a). Congress also amended 28 U.S.C. § 1781 (which had been enacted in 1948 together with Section 1782), giving the Department of State express authority to respond to letters rogatory or requests "by foreign and international tribunals." 1964 U.S.C.C.A.N. at 3787.

In the same legislation Congress amended Section 1782, to "clarif[y] and liberalize[] existing U.S. procedures for assisting foreign and international tribunals and litigants" and "adjust[] those procedures [for obtaining evidence in the United States] to the requirements of foreign practice and procedure." *Id.* at 3788. The Senate Report noted specifically the increasing use of "investigating magistrates" and "the constant growth of ad-

ministrative and quasi-judicial proceedings all over the world" as reasons for replacing the prior term "judicial proceeding" with "proceeding in a foreign or international tribunal." *Ibid.* This change was made in part to ensure judicial assistance for French *juges d'instruction*, which are factfinders roughly equivalent to the grand jury in U.S. criminal practice. *In re Letters Rogatory Issued by Dir. of Inspection of the Gov't of India*, 385 F.2d 1017, 1020 (2d Cir. 1967) (Friendly, J.). The Senate Report also described a purpose of the amendments as clarifying *who* (in addition to the foreign or international tribunal) was entitled to seek discovery under Section 1782: "an interested person, such as a person designated by or under a foreign law, or a party to the foreign or international litigation." 1964 U.S.C.C.A.N. at 3789.

In 1996, Congress added a single phrase to indicate that "a proceeding in a foreign or international tribunal" includes "criminal investigations conducted before formal accusation." Pub. L. No. 104-106, Div. A, Title XIII, § 1342(b), 110 Stat. 496. In its current form (as amended in 1949, 1964, and 1996), Section 1782 reads in pertinent part (emphasis added):

> (a) The [U.S.] district court * * * may order [a person] to give his testimony or statement or to produce a document or other thing *for use in* a *proceeding* in a *foreign or international tribunal*, including criminal investigations conducted before formal accusation. The order may be made pursuant to a letter rogatory issued, or request made, by a foreign or international tribunal *or upon the application of any interested person* * * *. The order may prescribe the practice and procedure, which may be in whole or part the practice and procedure of the foreign country or the international tribunal, for taking the testimony or statement or producing the document or other thing. To the extent that the order does not prescribe otherwise, the testimony or statement shall be taken, and the document or other thing produced, in accordance with the Federal Rules of Civil Procedure.

Companies and individuals have sought the assistance of U.S. courts in obtaining discovery on the theory that they are "interested persons" even when they are not litigants or otherwise authorized by foreign law to seek discovery; even when there is no "proceeding in a foreign or international tribunal" taking place; and even when foreign law does not permit the discovery of the documents or testimony sought. Splits of authority have developed over what constitutes a "proceeding in a foreign or international tribunal" and over whether the documents or testimony sought must be discoverable under the law of the sovereign country where the proceeding is taking place. This Court granted certiorari to resolve those splits and other questions raised by petitioner and the Acting Solicitor General.

B. The Proceedings Below and the Ninth Circuit's Decision

Respondent Advanced Micro Devices, Inc., is one of petitioner Intel Corporation's primary competitors in the production and sale of computer microchips. Respondent filed a complaint with the European Commission Directorate General-Competition (Directorate), one of more than 100 such complaints the Commission receives yearly. European Commission Directorate-General for Competition, *XXXIst Report on Competition Policy* 11, 53 fig. 1 (2001), available at http://europ.eu.int/comm/competition/annual_reports/2001/competition_policy/eu.pdf. In much the same manner, myriad complaints are filed yearly in the United States with the Antitrust Division of the U.S. Department of Justice and with the Federal Trade Commission.

To file a complaint with the European Commission, a party like respondent need only send a letter or a facsimile, with "the complainant's name and address," the "identity of the firms in question," "[e]vidence of the complainant's legitimate interest in the matter," and a "clear description of the subject of the complaint and the reasons for thinking that the practice infringes [European] Community competition law." *Complaints from the*

Public on Competition Matters, published at http://europa.eu.int/comm/competition/citizen/citizen_complaints_en.html (visited Dec. 13, 2003). A similar complaint procedure exists in both U.S. antitrust enforcement agencies. See *How to Report a Possible Violation*, published at http://www.usdoj.gov/atr/contact/newcase.htm (visited Dec. 13, 2003); *Antitrust Contact Information*, published at http://www.ftc.gov/ftc/bccontact.htm (visited Dec. 13, 2003).

By filing the complaint, respondent initiated an investigation, in which the Directorate "may gather information on its own and provide the complainant with an opportunity to support its allegations." Pet. App. 3a. "The Directorate also has the authority to seek information directly from the alleged infringer [of Community competition law] and may punish a failure to provide information." *Ibid.* (citing Council Regulation 17/64, arts. 11, 14). The process – which is *not* an adversary proceeding (*ibid.*) – is extremely similar in all pertinent respects to the investigatory process following a complaint made to the U.S. antitrust enforcement agencies. During an investigation by the Antitrust Division or Federal Trade Commission, anybody may comment simply by sending an e-mail to the agency. See http://www.usdoj.gov/atr/contact.html#cases; http://www.ftc.gov/ftc/bccontact.htm. Complainants regularly present allegations of anticompetitive conduct to the U.S. agencies. Both agencies possess authority under the Antitrust Civil Process Act, 15 U.S.C. §§ 1311-1314 (CID Statute), to issue "civil investigative demands" seeking documents or testimony, and compliance is compelled by the criminal code, 18 U.S.C. § 1505.

The investigation by the Directorate is a preliminary investigation, which, as the Ninth Circuit itself recognized, "is not considered an adversarial proceeding." Pet. App. 3a (citing *AKZO Chemie BV* v. *Commission*, 1 C.M.L.R. 231, 248 (E.C.J. 1986)). At this point, the Directorate still could simply decide not to pursue the complaint, an exercise of prosecutorial discretion potentially subject to limited review by the European Court of First Instance. Pet. App. 4a (citing *Stork Amsterdam*

BV v. *Commission*, 5 C.M.L.R. 31, 42 (Ct. of First Instance 2000)); U.S. Br. 19 & n.7 (Oct. 6, 2003) (explaining limited nature of judicial review of Commission decision not to proceed). If, after concluding the preliminary investigation, the Commission were to decide to proceed by issuing a formal statement of objections against petitioner, petitioner – and not respondent – would have the right to a hearing before an independent hearing officer. The hearing officer would issue a report on the hearing, and thereafter the Commission's staff would make a recommendation. Then, based on that recommendation, the Commission would either dismiss the complaint or issue a decision drafted by the investigative staff finding a violation. In this case, the matter has not progressed beyond the preliminary investigation by the Directorate. But, despite the absence of an adversary proceeding between the Commission and petitioner, respondent – which would not be a litigant even at a *future* stage – seeks discovery under Section 1782.

The Ninth Circuit interpreted Section 1782 to give mere complainants before the Commission a right to discovery. The court held that the Commission's preliminary investigation sufficed to allow Section 1782 discovery because "the investigation being conducted by its [the Commission's] Directorate is related to a quasi-judicial or judicial proceeding" and, "[a]lthough preliminary, the process qualifies as a 'proceeding before a tribunal' within the meaning of" Section 1782. Pet. App. 7a. The court also was unconcerned that the law of the European Union does not enable complainants to access the materials respondent sought from petitioner, holding instead that Section 1782's failure expressly to *exclude* materials not discoverable under the law of the foreign tribunal means that those materials *are* discoverable. Pet. App. 8a. The Ninth Circuit justified its "allowance of liberal discovery" by citing the "twin aims of Section 1782: providing efficient assistance to participants in international litigation and encouraging foreign countries by example to provide similar assistance to our courts." *Ibid.* (citing *In re Malev Hungarian Airlines*, 964 F.2d 97, 100 (2d Cir. 1992)). The Ninth Circuit therefore

ordered the district court to "consider" respondent's discovery request "on the merits." *Id.* at 9a.

SUMMARY OF ARGUMENT

The text of Section 1782 limits the parties that may seek judicial assistance from a U.S. district court under the section to the tribunal itself and to "interested persons." In this case the Directorate expressly declined to request the documents respondent seeks under Section 1782, and the Court of First Instance certainly has not sought them – so only an "interested person" may avail itself of the statute. Although the Ninth Circuit failed to consider the question, respondent cannot be an "interested person." The only reasonable reading of the statute limits persons entitled to discovery to litigants and those (principally governmental officials) otherwise denominated by foreign law as having the kind of "interest" that gives them discovery rights under foreign law – and, unsurprisingly, all indications are that the reasonable construction is just what Congress intended. 1964 U.S.C.C.A.N. at 3789. Respondent is not a litigant, and may never be a litigant; and there is no provision of European Union law that grants respondent the right to discovery.

Section 1782, by its text, permits judicial assistance to parties seeking discovery only when the request is for use in a "proceeding in a foreign or international tribunal." A tribunal, in turn, is an adjudicative agency. Respondent sought discovery under Section 1782 while the Directorate was conducting a *preliminary investigation* – the result of which at most could be a decision by the Commission to issue, or not to issue, a formal statement of objections. Finally, the Commission's ultimate decision regarding a formal statement of objections was reviewable by a tribunal – the European Court of First Instance. No basis exists for interpreting the phrase "for use in a proceeding in a * * * tribunal" to encompass discovery at all stages of investigation that may, or may not, end up before an adjudicative body.

The Ninth Circuit also erred by holding that Section 1782 authorizes discovery in the United States even if the materials sought would not be discoverable in the foreign tribunal. Despite the Ninth Circuit's statements to the contrary, this holding impedes, rather than advances, Congress's important – and clearly expressed – concerns for international comity. But the court's error extends further, because respondent would not even be entitled to discovery under U.S. law. The Ninth Circuit erred by attributing to Congress an intent to enact a discovery scheme that has no precedent either in domestic or in foreign law and allows easy circumvention of limitations on discovery that foreign sovereigns consider important.

ARGUMENT

The Ninth Circuit has adopted a reading of Section 1782 that eliminates any symmetry of obligations between the United States and foreign sovereigns; that does violence to the language, structure, history, and purposes of the statute; and that produces far-reaching results that Congress could not have intended. Because the discovery that respondent seeks from petitioner is not available under Section 1782, the Court should reverse the decision of the Ninth Circuit. The Ninth Circuit was wrong on each of the three issues raised by the petition; rejecting its position on any one of those issues would dispose of this case.

The Ninth Circuit's interpretation of Section 1782 does violence to the text, structure, and purposes of the statute in three significant respects. First, by failing to limit discovery to litigants before the foreign proceedings and a carefully circumscribed class of other "interested persons," the Ninth Circuit's interpretation of the statute expands discovery in foreign proceedings *ad infinitum*, allowing discovery by any person who can claim an "interest" in some potential future proceeding in the broadest possible sense of that term. Second, by treating an investigation by the Directorate as sufficient because it is, relates to, or leads to a "proceeding in a foreign * * * tribunal," the Ninth Circuit upended the statutory mandate that discovery

be permitted only after an adversary proceeding has been initiated. Third, by allowing discovery that is not permitted under EU law, the Ninth Circuit undermined the important international comity rationale underlying Section 1782.

I. Judicial Assistance Under Section 1782 Is Available to Litigants, to Persons Otherwise Denominated "Interested Persons" Under Applicable Foreign Law, and to the Foreign or International Tribunal – But Not to Respondent

Section 1782 should be construed to limit "interested person[s]" who may achieve discovery under the section to *litigants* before a foreign tribunal – or persons (generally, governmental officials) that foreign law otherwise permits to obtain discovery. The Eleventh Circuit has interpreted the phrase "interested persons" to include private *litigants* and "foreign official[s] properly designated under foreign law." *In re Request for Judicial Assistance from Ministry of Legal Affairs of Trinidad & Tobago*, 848 F.2d 1151, 1155 (2d Cir. 1988). This interpretation imposes a sensible and necessary limit on the discovery available to private parties under Section 1782. The Ninth Circuit reached the wrong decision largely because it utterly failed to consider the question whether respondent was a statutory "interested person."

Failing to read such a sensible limitation into the phrase "interested person[s]" has the perverse result of removing all limits on the set of persons who are authorized by the section to seek discovery of petitioner's, and others', confidential business information. This Court looks to statutory structure, purpose, and history to read limitations into statutory language that otherwise is unbounded. See *Egelhoff* v. *Egelhoff*, 532 U.S. 141, 147 (2001) (limiting the scope of the logically unbounded statutory phrase "relating to" in ERISA preemption). The Court should do so here.

Congress used precisely the same wording that is found in Section 1782 – "upon application of any interested person" –

elsewhere in the 1964 legislation. "'[I]dentical words used in different parts of the same act are intended to have the same meaning.'" *Department of Revenue* v. *ACF Indus., Inc.*, 510 U.S. 332, 342 (1994) (quoting *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986)). In 28 U.S.C. § 1696(a), Congress authorized district courts to offer judicial assistance for service of process in response to a request "by a foreign or international tribunal or upon application of any interested person." The purpose of Section 1696 is to "provide for service of documents in litigation with international aspects." 1964 U.S.C.C.A.N. at 3785. If respondent, a non-party, is entitled to judicial assistance under Section 1782, non-parties likewise are entitled to judicial assistance making service of process under Section 1696. But that result makes no sense.

Rather, the phrase "any interested person" should be read so that both uses are defensible. Restricting "any interested person" to parties that might have reason to want to effect service – *e.g.*, litigants – produces just such defensible results. And the reference in the legislative history to a "person designated by foreign law" (1964 U.S.C.C.A.N. at 3789; see *Trinidad & Tobago*, 848 F.2d at 1155 ("a foreign official properly designated under foreign law may fall within the definition of 'interested person'")) might readily denote an official designated to assist in service and discovery matters in foreign litigation. Compare 28 U.S.C. § 1608(a)(4) (U.S. Secretary of State designated by U.S. law to assist in service of process on foreign sovereigns).

All indications are that when enacting Section 1782 Congress intended to limit "any interested person" to private litigants, or to foreign officials properly designated by foreign law as having the kinds of responsibilities that entitle them to discovery as non-litigants. According to the legislative history of Section 1782, an "interested person" is a "person designated by foreign law, or a party to the foreign or international litigation." 1964 U.S.C.C.A.N. at 3789. See *Trinidad & Tobago*, 848 F.2d at 1154-1155 (quoting the legislative history);

see also *In re Lancaster Factoring Co.*, 90 F.3d 38, 42 (2d Cir. 1996) ("The legislative history to § 1782 makes plain that 'interested person' includes 'a party to the foreign * * * litigation.'") (quoting 1964 U.S.C.C.A.N. at 3789). President Kennedy and Director Olney (of the Administrative Office of the U.S. Courts) spoke only of "private litigants," and the legislative history otherwise discussed "litigation with international aspects." See p. 4, *supra*. Notably absent from the legislative history is *any* discussion of parties, like respondent, that are not litigants and have no right under foreign law to conduct discovery in the proceeding for which the U.S. discovery supposedly is sought.

The Acting Solicitor General seems to think discovery *should* be denied in this case (see U.S. Br. 18 (Oct. 6, 2003)), yet he urges that the matter is completely discretionary with district judges around the country and that this Court should hold that mere complainants in European Commission proceedings are "interested persons" (*id.* at 16, 18). His sole reasoning in support of that argument, however, is the *ipse dixit* that "the words 'interested person' are broad" coupled with the correct observation that Congress's selection of that phrase – as opposed to "litigant" – was "intentional." *Id.* at 16. But no one contends that "interested persons" are *only* litigants – rather, the dispute is whether the class of "interested persons" who are *not* litigants is a very narrow class consistent with the legislative history, the purposes of the statute, and the use of that phrase in other provisions of the 1964 legislation; or is instead expansive so that any old "interest" in the non-legal sense of that word will suffice. Surely even the Acting Solicitor General would recognize *some* limits on the "interest[s]" that will trigger Section 1782; a scholar's or corporate gadfly's or journalist's literal "interest" in the European proceedings could not possibly entitle that person to invoke Section 1782. But the Acting Solicitor General offers no limiting principle that would draw the line beyond litigants but short of the entire universe of persons willing to say, "I'm interested." Cf. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 567-568 n.3 (1992) ("It is unclear to us what

constitutes a 'genuine' interest; how it differs from a 'non-genuine' interest (which nonetheless prompted a plaintiff to file suit); and why such an interest in animals should be different from such an interest in anything else that is the subject of a lawsuit."). Petitioner and the Chamber, by contrast, offer defensible lines well grounded in both statutory structure and legislative history.

Interpreting the statute to limit the persons entitled to take advantage of Section 1782 makes perfect sense in light of the limitations on discovery available under U.S. law. Under the Federal Rules of Civil Procedure, discovery is available only if a party first files a complaint adequate to survive a motion to dismiss. See Fed. R. Civ. P. 3, 12(b)(6). A defendant's ability to seek dismissal under Rule 12(b)(6) – and the ability to seek sanctions under Rule 11 – ensure that the discovery process is not employed frivolously. Also, the tort of abuse of process is available to U.S. defendants who can plead and prove that their adversary sought to gain from the process, but not from the end, of the litigation. See, *e.g.*, *Warren* v. *Wasserman, Comden & Casselman*, 271 Cal. Rptr. 579, 581 (Cal. App. 1990) (describing abuse of process under California law). And the federal rules permit strict limitations on access to discovery by non-parties, in the form of protective orders under Rule 26(c).[3]

Finally, the statutory purposes fully support limiting use of Section 1782 to litigants and a narrow class of other "interested

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[3] Stringent protections also exist for companies being investigated by U.S. administrative agencies – including the Antitrust Division and Federal Trade Commission. The CID statute provides: "[N]o documentary material, answers to interrogatories, or transcripts of oral testimony, or copies thereof, so produced shall be available for examination, without the consent of the person who produced such material." 15 U.S.C. § 1313(c)(3). And the Freedom of Information Act contains express exemptions for "trade secrets and commercial or financial information obtained from a person and privileged or confidential" and certain "records or information compiled for law enforcement purposes." 5 U.S.C. § 552(b)(4), (b)(7).

persons" with legally cognizable interests defined by foreign law. As the Ninth Circuit itself described "the twin aims of Section 1782," they were "providing efficient assistance to *participants in international litigation* and encouraging foreign countries by example to provide *similar* assistance to our *courts*." Pet. App. 8a (emphasis added) (citing *Malev*, 964 F.2d at 100). The obvious conclusion to draw from the fact that these are the statutory purposes is that only litigants and a small class of other interested persons closely linked to court proceedings are the intended beneficiaries of the statute, yet the Ninth Circuit without analysis announced the polar opposite conclusion that these purposes support "allowance of liberal discovery," Pet. App. 8a, apparently meaning that all statutory terms are to be construed as expansively as possible. This mode of statutory interpretation will not do.[4] Rather, as this Court's statutory interpretation jurisprudence dictates, "interested persons" must be construed no more expansively than the text, structure, purposes, and history of Section 1782 will support. As shown above, all of those indicia of legislative intent support a narrow construction that does not include mere complainants in European Commission investigations.

II. Section 1782 Permits Judicial Assistance in Connection With A Proceeding in a Foreign or International Tribunal – And Not as Part of a Mere Investigation by Law-Enforcement Authorities

"The principal requirement imposed by § 1782 is that the requested discovery be for use in 'a proceeding.'" *In re Lancaster Factoring*, 90 F.3d at 41. This Court may reverse the

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[4] "'[N]o legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice — and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.'" *PBGC* v. *LTV Corp.*, 496 U.S. 633, 646-647 (1990) (quoting *Rodriguez* v. *United States*, 480 U.S. 522, 525-526 (1987) (per curiam)).

decision below because the investigation by the Directorate was not a proceeding before a tribunal, and not every proceeding "related to" such a proceeding (Pet. App. 7a) can trigger the statute. A "tribunal" is a proceeding "in which an adjudicating function is being exercised." *Lancaster Factoring*, 90 F.3d at 41 (holding that a then-pending foreign bankruptcy proceeding met the statutory requirement). "[N]ot every conceivable fact-finding or adjudicative body is covered, even when the body operates under the imprimatur of a foreign government." *Republic of Kazakhstan* v. *Biedermann Int'l*, 168 F.3d 880, 882 (5th Cir. 1999). The range of applications for Section 1782 is limited; as Judge Friendly observed, the section does not "go to the full extent of authorizing a district court to execute letters rogatory whenever requested by a foreign country or party there." *Gov't of India*, 385 F.2d at 1020.

The Ninth Circuit held that the preliminary investigation by the Directorate was sufficient to trigger Section 1782, offering a justification based on two faulty conclusions. *First*, by rejecting petitioner's argument that the Commission "is not a tribunal" (Pet. App. 6a), the Ninth Circuit seems to have concluded that at some point the Commission will become a "tribunal," presumably because the court saw the final decision by the Commission after a second-phase investigation as a quasi-judicial proceeding. *Second*, the Ninth Circuit concluded that it was adequate that the preliminary investigation in which respondent sought the discovery was "related to a quasi-judicial or judicial proceeding." Pet. App. 7a. Both conclusions are wrong.

A. The proceedings leading to an ultimate Commission decision are not quasi-judicial. In urging this Court to grant certiorari in this case, the European Commission stated that "[t]he Ninth Circuit's holding fundamentally misconstrues the nature of the European Commission. The Commission functions primarily as a law enforcement agency in the antitrust field * * *. The Commission * * * never adjudicates disputes between parties." Brief of the Commission of the European Com-

munities as *Amicus Curiae* in Support of Petitioner 4-5 (Nov. 15, 2002). The district court reached the same conclusion, citing the European Commission's *Eleventh Report on Competition Policy* (1981): "The Commission['s] * * * 'procedure[] relating to restrictive practices and abuse of dominant position [the substance of the complaint underlying the Commission's investigation of petitioner] is administrative and not judicial; it must not be turned into a trial.'" Pet. App. 14a.

This Court should defer to the Commission's understanding of its own procedures both as a matter of comity *and* because the Commission is far better placed than any other source to interpret its role. Compare *Kolovrat* v. *Oregon*, 366 U.S. 187, 194-195 (1961) (according weight to interpretations by the government of the Kingdom of Serbia and the U.S. State Department of a treaty between the countries); *S&S Machinery Co.* v. *Masinexportimport*, 706 F.2d 411, 415 (2d Cir.) ("[S]tatements of foreign officials – regardless of their political or ideological orientation – have been accorded great weight in determining whether an entity is entitled to claim the protection of the FSIA."), cert. denied, 464 U.S. 850 (1983). Such deference is accorded to U.S. agencies' interpretations of their own proceedings. See *International Tel. & Tel. Corp.* v. *International Bhd. of Elec. Workers*, 419 U.S. 428, 441 (1975) ("While an agency's interpretation of the [Administrative Procedure] Act may not be entitled to the same weight as the agency's interpretation of its own substantive mandate, its characterization of its own proceeding is entitled to weight, and that characterization may in turn have relevance in determining the applicability of the Act.") (citation omitted).

This Court can reverse the Ninth Circuit's misinterpretation of the "proceeding in a foreign * * * tribunal" requirement on the basis of the Commission's interpretation of its own law and procedures. But an analysis of the investigation based on which respondent sought discovery also leads to the conclusion that neither the Directorate's preliminary investigation nor even

its final decision is a "proceeding in a * * * tribunal" within the meaning of 28 U.S.C. § 1782(a).

The preliminary investigation by the Directorate is functionally indistinguishable from a preliminary investigation by the Antitrust Division or the Federal Trade Commission. According to European Council Regulation 17/62, art. 14(1):

> In carrying out the duties assigned to it * * *, the Commission may undertake all necessary investigations * * *. To this end the officials authorized by the Commission are empowered:
>
> (a) to examine the books and other business records;
>
> (b) to take copies of or extracts from the books and business records;
>
> (c) to ask for oral explanations on the spot;
>
> (d) to enter the premises; land and means of transport of undertakings.

Also, the Directorate "may obtain all necessary information from * * * undertakings and associations of undertakings. * * * The owners of the undertakings or their representatives * * * shall supply the information requested." Council Regulation 17/62, art. 11(1), (4).

The Directorate's investigative powers compare closely with the powers exercised by the Antitrust Division under the CID Statute (15 U.S.C. § 1312(a)):

> Whenever the * * * Antitrust Division * * * has reason to believe that any person * * * may have any information, relevant to a civil antitrust investigation * * *, [it] may * * * issue in writing * * * a civil investigative demand requiring such person to produce such documentary material for inspection and copying * * *, to answer in writing written interrogatories, to give oral testimony * * *, or to furnish any combination of such material, answers, or testimony.

Other comparable powers under U.S. law include grand jury investigations (Fed. R. Crim. P. 6) and search warrants executed by the FBI (Fed. R. Crim. P. 41).

Once the investigation moves to a second phase – which the investigation that is the subject of this case has not done – it is true that the Commission may determine that the party under investigation has violated the law and may take corrective measures. But that fact alone does not make the Commission a "tribunal." Rather, because the Commission proceeds in the second phase *without* an adversary process – a private complainant such as respondent Advanced Micro Devices has no right to do anything more than observe the non-evidentiary hearing the Commission conducts before making its decision – any conclusion by the Ninth Circuit that the Commission is a "tribunal" is incorrect, even if the investigation reaches the second phase.[5]

Also, again, the interpretation of the key phrase "proceeding in a foreign or international tribunal" in Section 1782 must be harmonized with the interpretation of the identical phrase in Section 1696. *ACF Indus.*, 510 U.S. at 342. Because Section 1696 allows assistance for service-of-process purposes, a "proceeding in a foreign * * * tribunal" in that section can only be a proceeding in which service of process might occur – *i.e.*, *not* a mere administrative investigation. It is anomalous to interpret "proceeding in a foreign * * * tribunal" in Section 1782 (as the Ninth Circuit did) to encompass an administrative investigation in which judicial assistance effecting service under Section 1696 would be unnecessary.

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[5] See *Fonseca* v. *Blumenthal*, 620 F.2d 322, 324 (2d Cir. 1980) ("Unlike the [French] juges d'instruction, the Superintendent * * * is charged to act in the government's interest to enforce the law * * *. He has extraordinary powers to order and conduct far-reaching investigations. Upon completion of his investigation, he is empowered to determine whether violation of the law has occurred. Although the subject of the investigation may be represented by counsel, the government's sole representative is the Superintendent itself.").

The call for harmonization is accentuated in this case because Congress *enacted* Section 1696 as part of the same legislation in which it *amended* Section 1782. Had Congress meant for the change from "judicial proceeding" to "proceeding in a foreign * * * tribunal" to render Section 1782 applicable to administrative investigations or prosecutions, it would have preserved the prior statutory term "judicial proceeding" (or some comparable phrasing) in Section 1696. But the new phrase gives effect to *both* sections if "proceeding[s] in a foreign tribunal" encompasses the range of adjudicative functions in which service of process may be needed, but not other types of legal procedures. Under that manifestly reasonable interpretation, a "proceeding" in a "tribunal" does not include either the preliminary investigation at issue in this case, or any subsequent (and currently speculative) second-phase investigation.

B. The Ninth Circuit's analysis is unclear whether it is the Commission decision to issue, or not to issue, a formal complaint that supposedly constitutes the "proceeding in a tribunal," or whether it is the possible later review by the Court of First Instance. But, in either case, the Ninth Circuit further erred by creating a "related to" test (Pet. App. 7a) for deciding whether the investigation by the Directorate might qualify as a proceeding under Section 1782.

The Ninth Circuit's exception to the clear statutory limitations on the scope of permissible discovery cannot be justified. To begin with, this Court has recognized the breadth of the concept "relatedness." In an Airline Deregulation Act preemption decision, *Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992), the Court held that the phrase "relating to" in former 49 U.S.C. § 1305(a)(1) (now 49 U.S.C. § 41713(b)(1)) was intended to preempt any state law with "'a connection with, or reference to'" the subject of the preemption clause. (quoting *Shaw* v. *Delta Air Lines, Inc.*, 463 U.S. 85, 97 (1983)). And relatedness tests also permit courts to aggregate overall effects of activities that individually may have only *de minimis* effect. See *United States* v. *Lopez*, 514 U.S. 549, 558 (1995).

In creating a "related to" test, the Ninth Circuit apparently believed that Section 1782 could be employed in any situation with *any connection with* a proceeding in a tribunal, even if *de minimis* in nature – a concept that readily might reach activities such as extra-judicial settlement negotiations or mediation. No basis exists to extend the plain language of Section 1782 this broadly without any indication in the text of the statute or elsewhere that Congress had that intent.

And the Ninth Circuit's attempted justification in no way explains its unwarranted extension of the plain language of Section 1782. The court made much of the elimination of the word "pending" from the text of Section 1782, as if that change undermined even the clear interpretation of the language that remains. Pet. App. 6a; accord U.S. Br. 16-17 & n.5 (Oct. 6, 2003). But that minor – and perhaps inadvertent – change in the text of Section 1782 (see *In re International Judicial Assistance for the Federative Republic of Brazil Gen. Univ. Trading Corp.*, 936 F.2d 702, 705 (2d Cir. 1991)) cannot bear the weight that the Ninth Circuit and the Acting Solicitor General have placed on it. Nothing in the legislative history indicates that Congress ever intended that the existence of any and all possible future "proceedings in a foreign * * * tribunal" would justify discovery of U.S. companies' documents and testimony. "If the omission of 'pending' was intended to mean 'eventually occurring,' we would expect to see at least some hint of that thought in the authoritative reports issued by the members of the Senate and House committees." *Id.* at 706.[6]

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[6] The Chamber also agrees with the observation at page 9 of the Commission's own *amicus* brief filed December 23, 2003, concerning possible future review of a non-prosecution decision by the Court of First Instance: "[I]f that feature were sufficient for a Section 1782 petitioner to claim that discovery is 'for use in a foreign ... tribunal,' it would open the statute to discovery requests in connection with *every* administrative agency action, regulation, investigation, license or permit anywhere in the world, so long as the action is ultimately subject to judicial review. Congress cannot have intended such an extreme result."

The Ninth Circuit's view of the elimination of the word "pending" removes *any* temporal limitation on the discovery allowed under the statute.[7] If it is not true after the amendment that a proceeding must either be pending or be of the precise type (pre-indictment criminal investigation) now specifically identified in the statute, then a much more reasonable interpretation of the section has been adopted by the Second Circuit. That court has held that a proceeding justifying discovery under Section 1782 must be "imminent – very likely to occur and very soon to occur in order to satisfy the statutory requirements." *In re Euromepa*, 154 F.3d 24, 29 (2d Cir. 1998) (internal quotation omitted). In *In re Ishihara Chemical Co.*, 251 F.3d 120 (2d Cir. 2001), although the original proceeding in which the discovery was sought had concluded, the party seeking discovery argued that the information would "be used in a new [patent] invalidity proceeding to be instituted in Japan." *Id.* at 126. The Second Circuit rejected that argument. The request for discovery was based on "speculation not only as to the commencement of such a proceeding, but also as to its need for discovery in such a proceeding." *Id.* at 127 n.4. So too here. Under the Ninth Circuit's interpretation of the statute, not only could respondent seek discovery without being a litigant now or in the near future, but also respondent would never have to demonstrate that it *ever will be* a litigant.[8]

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[7] Unwilling to carry his analysis to its logical conclusion, the Acting Solicitor General rejects an "imminence" requirement but insists that there is some limit here because the Commission investigation at issue is "*integrally linked* to a later 'proceeding in a foreign or international tribunal.'" U.S. Br. 17 (Oct. 6, 2003) (emphasis added). But, of course, the "integrally linked" formulation has no more textual basis than an "imminence" requirement, *and* suffers from indeterminacy: it is just as easy to argue that a Commission investigation is *not* integrally linked to a speculative future adjudication as to argue that it is linked to a future adjudicative proceeding.

[8] Even the Eleventh Circuit in *Trinidad & Tobago* – while holding that the proceeding in a foreign tribunal need not necessarily be pending –

In 1996, Congress added to the section the phrase "including *criminal investigations* conducted *before* formal accusation." Pub. L. No. 104-106, Div. A, Title XIII (emphasis added). Congress expanded the judicial assistance permissible in criminal cases under Section 1782 *beyond* the scope that was contemplated previously by the section. Congress's intent was very clear. The amended Section 1782 now permits discovery during the foreign equivalent of the grand jury process – a statutory change that further harmonizes Section 1782 with U.S. procedures. In the U.S. system, substantial pre-indictment investigation occurs – but discovery in the civil system is not allowed until *after* the complaint is filed. The need to amend Section 1782 specifically to allow pre-indictment judicial assistance demonstrates that pre-complaint judicial assistance generally is *not* contemplated by the Section.

Finally, this Court should read Section 1782 to be consistent with related provisions in the U.S. Code. *United Sav. Ass'n of Texas* v. *Timbers of Inwood Forest Associates, Ltd.*, 484 U.S. 365, 371 (1988) ("A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme * * * because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law."). Another statutory section, 15 U.S.C. § 6203(a), permits, "[o]n the application of the Attorney General," pre-complaint discovery in the U.S. as a part of foreign antitrust investigations. Notably, Section 6203 does *not* permit foreign antitrust investigative authorities to seek discovery under Section 1782. Under the Ninth Circuit's rule, respondent may use Section 1782 to conduct discovery before the initiation of a "proceeding," but a foreign antitrust authority must apply for

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limited its holding to requests from "official[s] properly designated under foreign law." 848 F.2d at 1155. "Therefore, the word 'litigant' in the legislative history does not restrict a request for assistance from a *foreign official* to 'pending' proceedings" (emphasis added) – but "a private individual may need to be a litigant in order to be an 'interested person.'" *Ibid.*

such authority through the Attorney General. There is no basis in law or policy for this supposed distinction.[9]

A similar analysis led the Fifth Circuit to hold that foreign private commercial arbitration was not a "proceeding in a * * * tribunal" for purposes of Section 1782. See *Republic of Kazakhstan*, 168 F.3d at 882-883. In *Republic of Kazakhstan*, the court compared to Section 1782 the judicial assistance available in domestic private commercial arbitration, noting that "domestically constituted arbitration panels, but not any 'interested party,' can invoke federal court jurisdiction to compel discovery." *Id.* at 883. "It is not likely that Congress would have chosen to authorize federal courts to assure broader discovery in aid of foreign private arbitration than is afforded in its domestic dispute-resolution counterpart." *Ibid.* It similarly is unlikely that Congress would implement careful procedures (under Section 6203) under which assistance to the *Directorate* might be permitted at this pre-complaint stage of the proceedings, but leave district courts unfettered discretion to grant *private parties* access to discovery (under Section 1782).

III. Section 1782 Does Not Authorize Circumvention of Foreign Tribunals' Limitations on Discovery

This Court should adopt the position of the First and Eleventh Circuits requiring that "the information sought in the United States would be discoverable under foreign law." *In re*

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[9] Section 6203 was enacted as part of the International Antitrust Enforcement Assistance Act of 1994, Pub. L. 103-488. The Senate Report accompanying the legislation cites testimony from a range of corporate interests, including *amicus curiae* Chamber, which supported the legislation and expressed concerns about protecting sensitive information from improper disclosure. S. REP. NO. 103-388, 103d Cong., 2d Sess., at 5 (1994). It strains credulity to believe that Congress took pains to protect the privacy of companies subject to investigation where international antitrust cooperation was concerned, but left untouched Section 1782, which under the Ninth Circuit's interpretation allows unchecked discovery by private parties.

Application of Asta Medica, S.A., 981 F.2d 1, 2, 7 (1st Cir. 1992); see *Trinidad and Tobago*, 848 F.2d at 1156.[10] This interpretation gives effect to Congress's expressed intent to "bring[] the United States to the forefront of nations adjusting their procedures to those of sister nations" – with the goal of "invit[ing] foreign countries similarly to adjust their procedures." 1964 U.S.C.C.A.N. at 3783. In the related context of the Hague Evidence Convention, this Court expressed confidence that other sovereigns' courts would respect *U.S.* discovery rules. See *Société Nationale Industrielle Aérospatiale* v. *U.S. District Court*, 482 U.S. 522, 542 (1987) ("It is well known that the scope of American discovery is often significantly broader than is permitted in other jurisdictions, and we are satisfied that foreign tribunals will recognize that the final decision on the evidence to be used in litigation conducted in American courts must be made by those courts."). In similar regard, Section 1782 should be interpreted to require U.S. courts to have respect for *other* jurisdictions' discovery rules.

But there is more. Respondent would not be entitled to the information sought in this case under U.S. discovery rules. Except in rare circumstances not implicated here, there is no discovery under the Federal Rules of Civil Procedure without first filing a civil action. See *In re Application of National Broadcasting Co.*, No. M-77 (RWS), 1998 WL 19994, at *7

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[10] The Ninth Circuit "[found] nothing in the plain language * * * of Section 1782 * * * to require a threshold showing on the party seeking discovery that what is sought be discoverable in the foreign proceeding." But the judicial assistance permitted by Section 1782 is for discovery of documents or testimony "*for use in* a proceeding in a foreign or international tribunal." (emphasis added). It is difficult to imagine how materials not discoverable in the foreign proceeding could be "for use in" that proceeding. This understanding also is informed by Congress's choice of the phrase "*in connection with* a proceeding in a foreign or international tribunal" (emphasis added) in Section 1696. Had Congress employed that broader phrase in Section 1782 as well as in Section 1696, it might have justified the Ninth Circuit's rule, but Congress did not do so.

(S.D.N.Y. Jan. 21, 1998) (noting that discovery under the Federal Rules is limited to parties to an action (per Rule 26(b)(1)) or – in limited circumstances – to a person who desires to "'perpetuate testimony'" and who "expects to be a party in such an action" (per Rule 27(a)). Respondent has done nothing more than file a complaint with an antitrust enforcement agency. If the Ninth Circuit's interpretation of Section 1782 were correct, Congress would have enacted a discovery regime that is not based either in the laws of the foreign sovereign where the proceeding justifying the discovery is taking place, or in the laws of the United States. Congress's intent, expressed in the legislative history and uniformly interpreted by the courts, was to encourage foreign courts to have reciprocal respect for U.S. litigation procedures. 1964 U.S.C.C.A.N. at 3783; see Pet. App. 8a. No reason exists for Congress to enact a scheme permitting judicial "assistance" to a degree that even the liberal rules of discovery in the U.S. (see *Aérospatiale*, 482 U.S. at 542) could not possibly justify.

And the statute that Congress enacted must not be broadened based on some misguided notions of comity. As the European Commission explained in its certiorari-stage *amicus* brief to this Court, the Ninth Circuit's interpretation of Section 1782, far from "providing efficient assistance to participants in international litigation" (Pet. App. 8a (citing *Malev*, 964 F.2d at 100)), actually will *undermine* foreign antitrust enforcement efforts. Like the Antitrust Division, the EU Competition Commission has adopted a corporate leniency policy, whereby it encourages members of cartels subject to that agency's jurisdiction voluntarily to expose the cartel. EC Br. 6 (Nov. 12, 2002). Compare *Corporate Leniency Policy*, 4 Trade Reg. Rep. (CCH) ¶ 13,113, at 20,649-21, 20,649-22 (Aug. 10, 2003) (Antitrust Division Corporate Leniency Policy). And, like the U.S. policy, the Commission's leniency program has been highly successful. On December 10, the Competition Commission levied €70 million in fines against members of a cartel that was exposed under the amnesty policy. *EU Imposes Almost €70 Million in Fines for Organic Peroxide Cartel Over*

29 Years, Vol. 85 ISSN No. 2135 (Dec. 12, 2003). The Ninth Circuit's rule "could undermine the EC's Leniency Program by destroying the confidentiality of submissions to the Commission and thereby deterring companies from coming forward in the first place with vital information about illegal cartel activity." Deputy Assistant Attorney General Makan Delrahim, *Department of Justice Perspectives on International Antitrust Enforcement: Recent Legal Developments and Policy Implications* 13-14 (Nov. 18, 2003), available at http://www.usdoj.gov/atr/public/speeches/201509.pdf (*Delrahim Remarks*).

As the First Circuit correctly predicted in *In re Application of Asta Medica, S.A.*, 981 F.2d at 6 "foreign countries may be offended by the use of United States procedure to circumvent their own procedures and laws."[11] Indeed, at page 13 of its merits-stage *amicus* brief filed December 23, 2003, the Commission "object[ed] to the potential subversion of limits that the European Union has imposed * * * on access by an antitrust complainant to the information that the Commission gathers in its investigation."

In *Empagran*, the court of appeals reached a comparable result – also from a misguided hyper-extension of policies

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[11] The Acting Solicitor General tepidly responds that, "[e]ven when the requesting entity is a private party, the unavailability of discovery under foreign law *does not necessarily* imply that foreign tribunals would take offense at the application of Section 1782." U.S. Br. 11 (Oct. 6, 2003) (emphasis added). But it is not plausible that a Congress palpably concerned with international comity left to the case-by-case discretion of hundreds of district judges the decision to do something that probably would – but "does not necessarily" – offend a foreign court. It is a particularly strained interpretation of the will of Congress to conclude simultaneously *both* that private non-litigants before a non-tribunal can invoke Section 1782, *and* that they are not limited to discovering that which would be discoverable under foreign law. The Acting Solicitor General notably does not believe that such discovery really should be authorized (*id.* at 18) but implausibly attributes to Congress the intention to leave these delicate questions to the discretion of district courts.

underlying a statutory scheme. In *Empagran*, the D.C. Circuit relied primarily on a deterrence rationale as justification for permitting worldwide plaintiff classes under the Foreign Trade Antitrust Improvements Act, 15 U.S.C. § 6a, including plaintiffs whose injuries occurred in transactions having no nexus to the United States. In a brief urging rehearing, the Solicitor General and the Antitrust Division argued that the increase in potential liability threatened the opposite effect from deterrence. Because companies that break from and expose a cartel remain civilly liable, increasing civil liability has the perverse effect of cementing cartels by making it more costly for a cartel member to break from the cartel under the Justice Department amnesty policy.

Of course, disincentives also arise, threatening the Antitrust Division's leniency policy, if *foreign countries* adopt policies that somehow make it more expensive for members of cartels with impacts on U.S. commerce to take advantage of the leniency policy. The comity rationale that the Ninth Circuit blithely cited in support of "liberal discovery" rules (Pet. App. 8a) ignores the equal importance of mutual respect for sovereigns' decisions how to enforce, and how not to enforce, their laws. See *In re Application for an Order for Judicial Assistance in a Foreign Proceeding*, 147 F.R.D. 223, 225 (C.D. Cal. 1993) ("The intent behind [Section 1782] was to * * * maintain respect for foreign countries' sovereign jurisdiction."), overruled by *Advanced Micro Devices, Inc.* v. *Intel Corp.*, 292 F.3d 664 (9th Cir. 2002) (see Pet. App. 9a n.4). The Ninth Circuit's rule risks encouraging other countries to adopt procedures that undermine the judicial processes of the United States. See *Asta Medica*, 981 F.2d at 7 ("[T]he broader goal of the statute – stimulating cooperation in international and foreign litigation – would be defeated since foreign jurisdictions would be reluctant to enact policies similar to Section 1782."). That result would be inimical to Congress's intent in enacting Section 1782, which was to "bring[] the United States to the forefront of nations adjusting their procedures to those of sister nations." 1964 U.S.C.C.A.N. at 3783.

Also like the D.C. Circuit in *Empagran*, a case that raised international concern by imposing U.S. antitrust laws and policies on foreign nations (see *Delrahim Remarks*, *supra*, at 9-10), the Ninth Circuit has made the uniquely liberal U.S. discovery system the choice option for litigants in foreign countries. Such a race-to-the-bottom approach will inevitably have the effect of encouraging global forum shopping and making the most liberal legal system the worldwide standard. Congress enacted both the FTAIA and Section 1782 to *enhance* international comity. The effect that these decisions threaten – making the United States the *de facto* courtroom to the world – was a result that Congress never intended.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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